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No. 214.

THE CITY AND SUBURBAN RAILWAY COMPANY, OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

HEDWIG E. SVEDBORG, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

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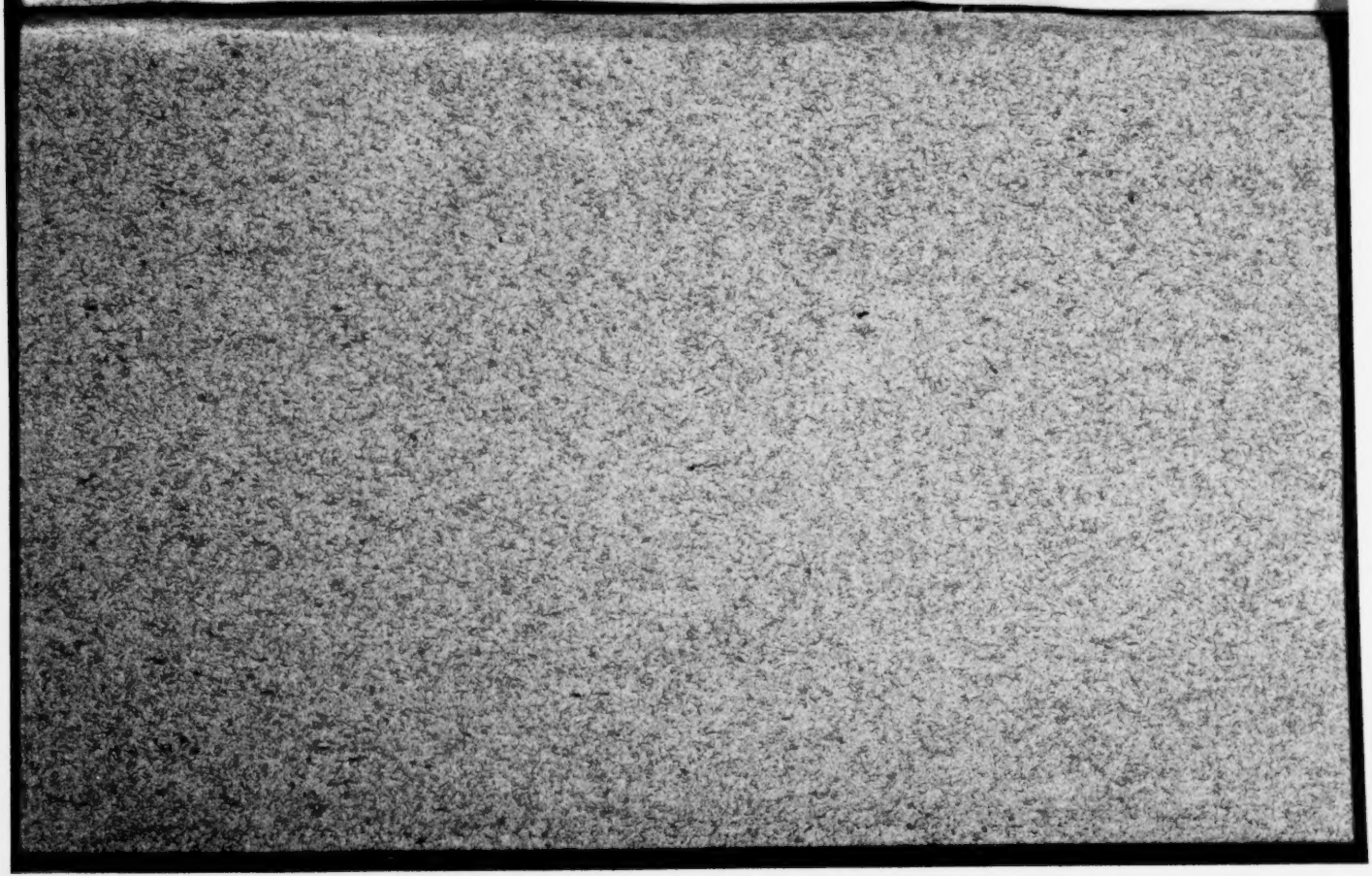

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BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia. The action was for damages for an injury to the person of the plaintiff, caused while alighting from one of the cars of the plaintiff in error, whereby she suffered a fracture of the femur. At the time of the accident, the car was bound east in C street, near the intersection of Eleventh street northeast. The declaration alleges that the car stopped for her to alight, at the point above mentioned, and that, while she was alighting, the car was suddenly started by the negligence of defendant, and she was thrown to the ground and injured (Rec. p. 2).

The only evidence on behalf of the plaintiff as to the circumstances of the accident was the testimony of herself and young daughter. At the close of the plaintiff's evidence, the counsel for the defendant moved the court to direct a verdict for defendant, which the court refused, and the defend-

ant excepted (Rec. p. 16). At the close of all the evidence on both sides, the same motion was renewed and again overruled, and defendant excepted (Rec. p. 25).

During the examination of one of defendant's witnesses, counsel for defendant referred to a memorandum made by said witness of an interview between him and plaintiff in relation to the accident. On cross-examination counsel for plaintiff demanded to be shown the memorandum, and the court ruled that he was entitled to have it for the purpose of cross-examination, and counsel for defendant excepted (Rec. p. 18).

Plaintiff testified at the trial that the conductor was not to blame for the accident, but she thought the motorman was, and there was absolutely no evidence tending to show any fault whatever on the part of the conductor. After the evidence was closed, the counsel for defendant requested the court to instruct the jury that unless they found from the evidence that there was negligence on the part of the motorman, their verdict should be for the defendant, but the court declined to so instruct, but, on the contrary, left it to the jury to determine whether there was negligence on the part of the conductor, and to this ruling of the court the counsel for the defendant excepted (Rec. pp. 25–26).

There was a verdict and judgment for the plaintiff in the trial court (the Supreme Court of the District of Columbia) for $6,500, from which the defendant in the trial court, the plaintiff in error here, appealed to the Court of Appeals of the District of Columbia, which affirmed the judgment of the trial court, and the case was removed here by writ of error. The Court of Appeals, in overruling the point of the plaintiff in error that the trial court should have taken the case from the jury on the whole evidence, applied the rule of *res ipsa loquitur*, and held that, inasmuch as the defendant in error was a passenger at the time of the accident, the proof of the injury to her was alone sufficient to raise the presumption of negligence on the part of the defendant in

error, and that it was a question for the jury whether that presumption was rebutted.

Assignment of Errors.

The court below erred:

First. In affirming the ruling of the trial court in refusing to instruct the jury to return a verdict for the plaintiff in error.

Second. In applying the rule of *res ipsa loquitur* to the case in determining the point mentioned in the first assignment of error.

Third. In affirming the ruling of the trial court in refusing to instruct the jury as prayed by the counsel for plaintiff in error.

Fourth. In affirming the judgment of the trial court.

ARGUMENT.

First.

The court should have instructed the jury to return a verdict for the defendant on the whole evidence. There was no evidence tending to show negligence on the part of the defendant sufficient to justify the submission of that question to the jury. The only evidence tending to show negligence was given by the plaintiff herself and her young daughter. The plaintiff herself upon that point testified as follows:

> "That the car stopped at Eleventh and C streets—on the west side thereof—and her daughter alighted; that while her daughter was walking up towards the front of the car, to procure the basket from the motorman, she attempted to alight, when the car jerked forward and threw her to the ground" . . . (Rec. pp. 4 and 5).

"On cross-examination this witness testified that the only person in the car besides herself and daughter, when they reached Eleventh street, was a gentleman, who occupied the same seat that plaintiff did, namely, the first seat on the north side of the car, in the open part thereof, the seats in the open part running crosswise of the car and consisting of two tiers, one on the south and one on the north side thereof, with an aisle between; that, when she left the seat to alight the gentleman was still sitting in it; that he did not get off the car before she did; that the car was standing when she arose to get off; that she kept her seat until the car stopped, and got up as soon as it stopped; that she stepped on the running board and looked towards the motorman to see if he handed the basket to her daughter; that as soon as her daughter reached to get the basket the car gave a jerk and she was thrown on her knees; that she is not positive whether the car started or gave a jerk; that she was on the running board one second when the car started or jerked; that her daughter got off the car at the side before witness, and had gotten up to the motorman before the car started; that she saw the motorman pick up the basket and hand it to her daughter when she was thrown; that the conductor was standing at the rear end counting fares; that she heard no bell for the car to start; that she got off on the running board in front of the first seat; *that the car was standing still and the motorman was standing to the right of the platform, with the basket in both hands, in the act of handing it to her daughter, when the car jerked; that the motorman put the basket down and came running to her assistance;* . . . that she thought the motorman was to blame, because she did not hear the conductor give the signal for the car to start, and she always thought the motorman was to blame for not stopping the car properly, or for starting the car in handing the basket over, and that the motorman could have started the car by kicking or unloosening the brake with his foot" . . . (see Rec. pp. 5 and 6).

The foregoing is all of the testimony of the plaintiff her-

self touching the question of negligence or how the accident occurred. The only other evidence upon that point is that of her daughter, Olga, a young girl. She testified as follows:

After testifying on her direct examination that after the car stopped she got off and went up towards the front of the car to get the basket from the motorman, she testified as follows:

"By Mr. LIPSCOMB:

Q. Where was your mother when you got off the car? A. When I got off the car she was just rising, ready to get off.

Q. And what did you say, if anything, to the motorman? A. I don't remember saying anything to him.

Q. What did you do at that time, and what did he do? A. *He handed the basket over. I didn't take it, though; but he handed it over with both hands.*

Q. *He handed it over?* A. *Yes, sir.*

Q. *Why did you not take it?* A. *Because I heard my mother scream, and I turned back to go to her.*

Q. You heard your mother scream? A. Yes, sir.

Q. Where was your mother when you turned to go to her? A. She was thrown beside the car.

Q. What had caused her to be thrown beside the car? A. *When the motorman handed the basket over with both hands it caused a jerk.*

Q. A jerk of what, Miss Olga? A. *Jerk of a car.*"

On cross-examination this witness testified as follows:

"By MR. COLE:

. . . . . .

Q. You do not remember whether you asked him for the basket or not? A. No, sir.

Q. But he did hand it out to you? A. Yes, sir.

Q. *And you say he held it in both hands—he used both hands in handing it out?* A. *Yes, sir.*

Q. *Do you feel quite positive of that?* A. *Yes, sir.*

Q. *How do you remember now that he handed it out with both hands rather than one?* A. *Because the basket was rather heavy. It required two hands to hand it over.*

Q. And the conductor handed the basket out to you with both hands? A. The motorman handed it out.

Q. I beg your pardon; I mean the motorman. Was it where you could have taken hold of it if you had not been prevented from doing so by hearing your mother scream or hearing that she had fallen? I mean to ask whether he had gotten the basket near enough to you so that you could have taken it if you had not been prevented by your mother's falling?

(The witness did not answer.)

Q. Do you understand what I mean? A. *Yes, sir; I believe I could have taken it.*

Q. You could have taken it? You could have reached it from where you stood and where the motorman stood handing it to you? You could have reached it if you had not been prevented from doing so by your mother's falling?

A. *No, sir; he handed it right over the fender. He had to put it over farther before I could reach it.*

Q. You say he would have had to put it over farther before you could have reached it? A. Yes, sir.

Q. Which side of the car was he on when he handed you the basket? A. *He was on the right-hand side.*

Q. *That was on the side you were on, of course?* A. *Yes, sir.*

Q. *And was he right at the side of the car—right at the side of the platform?* A. *Yes, sir.*

Q. Had he passed the basket out over the railing, over the dashboard or the gate, or whatever you call it? A. *No, sir; I think it was leaning on the gate. He had not lifted it over.*

Q. It was leaning on the gate? A. Yes, sir.

Q. *He had set it up on the gate?* A. *Yes, sir.*

Q. And that was the position it was in when the car started forward and your mother fell, and that diverted your attention, and you went back to your mother without taking the basket? A. *Yes, sir.*

Q. That is the way it occurred, is it? A. *Yes, sir.*

Q. That is your recollection about it now? I say, do you remember distinctly now that it did occur that way? A. Yes, sir.

Q. Do you know what caused the car to start forward or jerk at that time? How did it happen? What made the car jerk and start forward? A. The motorman had the basket with two hands, and I suppose that caused the jerk. He had two hands on the basket.

Q. He had both hands on the basket? A. Yes, sir.

Q. And you suppose that is the reason why the car jerked? A. Yes, sir.

Q. You saw no other cause for its jerking, except that he had both hands on the basket? A. When he picked the basket up he took two hands.

Q. Yes; and both hands were on the basket when the car jerked, were they? A. He was just about to pick the basket up with both hands when the jerk occurred.

Q. How is that? A. The jerk occurred when he put both hands on the basket.

Q. The car jerked when he put both hands on the basket; is that it? A. Yes, sir.

Q. I thought you said a moment ago that the car jerked when he was standing holding the basket on the railing for you to take. A. The jerk occurred when he let go of the lever to take both hands to put on the basket.

Q. Then the car jerked before he picked the basket up, did it? A. It jerked just as soon as he let go of the lever and put both hands on the basket.

Q. Did you see his hands when he let go of the lever? A. No, sir; I saw his two hands on the basket.

Q. Where was the basket when you first saw his two hands on it? A. He was lifting it to hand it to me over the gate.

Q. He was lifting it up to hand to you over the gate. Now, had the car jerked at that time, or did it jerk after that time? A. It jerked before.

Q. It jerked before that time? A. It jerked when he let go of the lever—when he put both hands on the basket.

Q. The car jerked when he let go of the lever to get the basket for you; that is true, is it? A. I don't quite understand.

Q. Why, I understand you to say now that the car jerked when the motorman let go of the lever to get you the basket. A. Yes, sir.

Q. Then you were mistaken a little while ago, or did not mean to say a little while ago, that the car jerked as he was about to pass the basket out to you? A. It jerked when he let go of the lever to hand the basket out (see Rec. pp. 8, 9, 10)."

The evidence on behalf of the defendant as to how the accident happened was as follows:

> "Walter Waters testified that he was the conductor on the train from which plaintiff had her accident, being employed at the present time with a railroad company in Pittsburg; that he signaled the motorman to stop at 11th and C streets; that just before the car came to a stop the lady walked off; that the car went from 2 to 2½ feet after plaintiff got off; that the gentleman who was on the car got off of the car before plaintiff did; that when the plaintiff got off, her daughter was in the aisle of the car, walking towards the running board of the car; that the car stopped only once at 11th and C streets, plaintiff jumping off before the car came to a stop; that the gentleman who was on the car (Meade) got off

while the car was in motion; the little girl did not get off while the car was so moving; that just before the car stopped witness gave three bells, because he saw plaintiff was going off and wanted car to stop as soon as possible.

"On cross-examination, this witness testified that the cars were on time, and that other cars came up while his car was standing there; that he did not ring three bells when the gentleman (Meade) alighted, because men jump off often—not ladies; that he was on the rear end of the car when he gave the bell, and did not come up front until the lady jumped off.

"On redirect examination he testified that the car stopped about twelve minutes; that he helped to pick the plaintiff up with the assistance of the gentleman (Meade).

"On recross-examination he testified that he never saw the basket of eggs." (Rec. pp. 20 and 21.)

"A. H. Hunt testified that he was the motorman of the car, having been a motorman ever since the electric cars have been on the line; that he got a bell at 10th and C streets to stop at 11th street; that just before car stopped he heard the conductor call to the lady to wait until the car stops; that he got off of the car to see what was the matter, and they had the plaintiff on her feet; that the car moved about 4 feet after receiving the three bells; that he was just coming to a stop; that cars did not come right up behind witness' car while he was waiting there; that he does not remember anything about the basket of eggs; that he put on the brakes as hard as he could and threw off the current, throwing the current off first; that the car can not be stopped without throwing the current off; that the car can not start, after it has stopped, without putting on current; that the car can not be jerked without putting current on; that there can not be a jerk after brake is off, unless there is a hill; that it is level at the point of accident; that the car would not start with current off; that the car stopped once at the corner; that when the car stopped plaintiff was in the street; that the

current is governed by the controller, which is on the left-hand side of the front of the car, and that the current can not be put on except through the use of the controller; that when standing by the gate on the right side of the car he can not reach the controller; that the brake is not operated with his feet; that a dog holds the brake after his hands are off, and that in order to release the brake the dog is removed from the ratchet on the brake-rod.

"On cross-examination he testified that he heard the conductor call to the lady; that he saw the little girl; that he did not hand her any basket and did not remember her having a basket of anything; that he heard no scream; that the car could not move forward if the brake is taken off after it has stopped, if there is no grade; that the brake can be taken off at the place of the accident, and the car won't move" (Rec. pp. 21 and 22).

"Albert R. Meade testified that he was on the car from which plaintiff had her accident, boarding it at the corner of 9th and G streets, N. W., the plaintiff boarding the car when it reached 7th and G, N. W., taking a seat beside witness; that just before the car reached its stopping place at 11th and C streets N. E. witness left his seat and alighted therefrom while the car was still in motion; that he left the seat before the plaintiff did; that just after he alighted from the car he heard a noise, and, looking around, saw the plaintiff in the rear of him on the ground; that at that time the car had not quite come to a stop, but stopped a few seconds afterwards; that he did not see the plaintiff's daughter before the accident, but afterwards; that he helped plaintiff up and gave his name to the conductor.

"On cross-examination he testified that he was one-half of a foot from the car when the plaintiff fell; that he alighted from the car before the plaintiff; that he saw the plaintiff on the street before the car had stopped; that he did not see plaintiff's daughter leave the car, and does not recollect having seen the basket" (Rec. pp. 22 and 23).

"H. B. Mathiot testified that he was a motorman in the employ of the defendant company, having been such for six years; that at the time of the accident the car on which he was motorman was about one-half a square in the rear of the car from which plaintiff had her accident; that he saw the witness Meade jump off of the car and start towards the pavement, and next saw plaintiff falling on the street; that just as the plaintiff fell he heard the conductor give three bells, when the witness Meade turned towards the plaintiff; that the car had not stopped before the plaintiff fell; that there is nothing on the platform of the car by which it can be started with the foot; that the grade at 11th and C streets is pretty near level.

"On cross-examination this witness testified that he was not a witness at the last trial; that the company did not know of him as a witness, and only found him out the night before; that he heard the case had started and spoke of it to George Tyser, another motorman who was on his car, and told him (Tyser) that he saw it; that this morning, when he asked to get off for the day, the clerk at the office told him that he was wanted at court, and sent him to Judge Cole's office. He further testified that the cars were all behind time that evening; that plaintiff's daughter Olga got off of the car after the accident; that the witness Meade had reached the curbstone when plaintiff got off; that he supposes the distance between the curbstone and the track is twenty feet; that the car moved about two feet while Meade was walking the distance of twenty.

"On redirect examination this witness testified that the car stopped but once at that point, and when it did stop the plaintiff was on the ground" (Rec. p. 24).

"Charles Fernald, a civil engineer in the employ of the District, who fixed the grade of the tracks, testified that the grade from Tenth to Eleventh streets is eight inches in one hundred feet, the descent being from Eleventh towards Tenth street;

that the grade between Eleventh and Twelfth streets northeast is six inches in one hundred feet, the descent being from Eleventh towards Twelfth street; that any grade less than two per cent is considered a flat grade; that the track across Twelfth street is substantially level" (Rec. p. 25).

"Robert E. Lee testified that he was the general superintendent of the defendant company; that the only means of applying the current to start the car was by a controller on the front of the car; that when the car is stopped by applying the brake the dog, which holds the brake, can not be released by a kick of the foot without first putting pressure on the brake-handle, when the dog can be kicked out of the ratchet. He further testified that if the controller had been turned off except one point and the brake put on, but the dog not put in use, on removing the motorman's hand from the crank the car would start" (Rec. p. 25).

"William Were and George B. Tyser testified that they were motormen in the employ of the defendant company; that they made experiments with the car from which plaintiff had her accident; that they ran the car to 11th and C streets northeast, threw the current off, applied the brakes, and, when the car stopped, threw the brakes off quickly in order to see if the car would start forward; that the car did not start forward at either trial; that the car was stopped on the west side of 11th street; that they then set the brakes, put the controller on five points to see if the car would move with the brake and the current on, and it did not; that it is impossible to kick the dog out of the ratchet without first taking hold of the brake and putting pressure upon it" (Rec. p. 25).

It will be seen from the foregoing testimony that the plaintiff testifies that the car had stopped still, and that while she was standing on the running-board, about to step off, she observed the motorman standing on the right-hand

side of the platform passing the basket out to her daughter with both hands, and that he was in that position when she says the car started forward, or jerked, and threw her. It is absolutely impossible that the accident could have occurred in that way. There is no way in which the car could have been started with the motorman in that position. The plaintiff's own testimony showed conclusively that there was no negligence on the part of the conductor. It will also be observed that the young daughter, on her direct examination, testified in that regard, as to the position of the motorman, precisely as her mother did; and on cross-examination reiterated her testimony given in chief, but subsequently changed it, and said that the car started when the motorman let go of the lever to take up the basket. That was the state of the evidence when the plaintiff's case closed. It is submitted that that was insufficient evidence to submit to the jury on the question of negligence. The daughter had testified both ways upon that subject. Her testimony was too vague, uncertain, and unreliable to be submitted to a jury at all. The only evidence that can be said to have the slightest tendency to prove negligence is that of the daughter, given after she had twice testified, showing that there was no negligence on the part of the motorman. Whether she gave the latter evidence from want of recollection or intentionally is immaterial. Where the only evidence tending to show negligence comes from a witness who testifies positively both ways as to the same identical fact, it is mere matter of speculation as to whether the witness is correct in any of her testimony, and it is rendered perfectly worthless for any purpose and ought not to have been submitted to the jury.

In the case of Peaslee *vs.* Glass, 61 Ill., 94, one of the questions was whether the plaintiff was corroborated. Upon that point the court said :

> "The only evidence to charge Peaslee is that of the plaintiff, who swears that in a conversation in

which he was complaining to Peaslee, the latter admitted the water had been turned off by his direction. We say the only evidence, because the young man in the employ of Glass, who testified to a conversation had by him with Peaslee, testifies both that Peaslee did and did not admit this and no weight can be attached to his testimony on this point."

The evidence on behalf of the defendant had no tendency to strengthen the plaintiff's case, but showed conclusively how the accident did happen and that it was without negligence on the part of the defendant, but through the negligence of the plaintiff. Not only the motorman and conductor of the car on which plaintiff was riding immediately before she was injured, but also a man who was riding on the car and got off at the same time as plaintiff did, as well as the motorman of the car following the one plaintiff was on, who was near enough to observe, concur in their testimony that the plaintiff stepped off the car before it stopped and was thereby thrown to the ground. It was also proved conclusively on behalf of the defendant that the street where the accident happened was level, and that a car would not start by throwing the brake off unless the current was on. The motorman also testified that he turned the current off before he put the brake on to stop the car, and that the dog was fixed and fastened to the brake. It is true that one of defendant's witnesses said that if the current had not been turned off and the brake had been put on and the car stopped, and the dog not put in use to hold the brake, when the motorman let go of the brake the car would have started, and this is the theory that the plaintiff was finally compelled to adopt.

But there was no evidence tending to prove any of these facts. It is true that the plaintiff's daughter testified that when the motorman removed his hand from the lever of the brake the car started. If that were the fact it might give some color of plausibility to the plaintiff's final theory. Her case depends upon whether the whole evidence

would support such a finding by the jury. It is submitted that it would not. The little girl had twice before testified, as her mother did, that the car started when the motorman was standing on the right side of the car holding the basket on or out over the rail with both hands. Clearly it would have been impossible for the car to have started or jerked with the motorman in that position. If the current was on and the dog not fixed it would have started the moment his hand left the lever. If the plaintiff's testimony be correct it did not start at that time. If the testimony first given by the daughter on direct examination and repeated on cross-examination be true, it did not. The plaintiff testified that when the car started or jerked and she fell, "the motorman put the basket down and came running to her assistance" (Rec. p. 6). Neither the plaintiff nor her daughter testified that he stopped to turn the current off and fix the brake. Had the car started and had the motorman left his post, as the plaintiff testified, the car would have gone on, which no one contends is the fact. It can hardly be said that there was even a *scintilla* of evidence tending to prove that the current was on and the dog not fixed and that the car started when the motorman removed his hand from the brakes. The evidence on behalf of the defendant proves clearly that the accident happened by the plaintiff's leaving the car while it was in motion. When the evidence for the plaintiff and defendant is all considered together it is wholly insufficient to support a verdict for the plaintiff. It does not support the conclusion that she was thrown from the car by a starting or jerking of it, and the court should so have instructed the jury.

Pleasants *vs.* Fant, 22 Wall. 116.
The Commissioners, etc., *vs.* Clark, 94 U. S. 278.
Randall *vs.* The B. & O. R. R. Co. 109 U. S. 478.
B. & O. R. R. Co. *vs.* St., use, etc., 71 Md. 590.
Duvall *vs.* B. & O. R. R. Co., 73 Md. 513.
P. W. & B. R. R. Co. *vs.* Burkhardt, 83 Md. 516.
Patton *vs.* Texas & Pac. R. R. Co., 179 U. S. 658.

In the 94th U. S., Mr. Justice Clifford, speaking on the point under consideration, said:

> "Matters of fact are involved in the exception to the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence is of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence (Ryder *vs.* Wombwell, Law Rep., 4 Exch. 39).
>
> "Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a cause, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In the case of Randall *vs.* The B. & O. R. R. Co., *supra*, there was some evidence tending to show negligence on the part of the defendant. In the statement of the case by the reporter the evidence is recited as follows:

> "A single witness, who had been a brakeman, called for the plaintiff, in answer to a question, often repeated, of his counsel, whether there was a safe and proper switch to be used at that point, testified that he could not say it was a very safe place at that time there; that he thought that was not a proper kind of switch, and an upright switch would have been more convenient to handle; that he did not think it was a very safe ball there; that he thought it was not a safe ball there; and that it could not be unlocked without danger while an engine or train was coming upon the other track."

Referring to this slight evidence, Mr. Justice Gray, in delivering the opinion of the court, uses this language:

"It is the settled law of this court, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant (Pleasant *vs.* Fant, 22 Wal. 116; Herbert *vs.* Butler, 97 U. S. 319; Bowditch *vs.* Boston, 101 U. S. 16; Grigg *vs.* Houston, 104 U. S. 553). And it has been recently decided by the House of Lords, upon careful consideration of the previous cases in England, that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred; and it was for the jury to say whether from those facts, when submitted to them, negligence could be inferred (Metropolitan Railway Co. *vs.* Jackson, 3 App. Cas. 193).

"Tried by this test, there was no sufficient evidence of any negligence on the part of the railway company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and of his witness was too slight."

The negligence claimed to exist in this case is that the motorman stopped the car by the brake without turning off the current fully; that the dog was not fixed so as to hold the brake in place, and that when he let go the brake to take up the basket, the current still being on, the brake loosened and the car started. The only evidence in any degree tending to establish any of those facts is that of the plaintiff's little daughter, who, after concurring with her mother in testifying to a statement of facts wholly inconsistent with such theory, stated that the car started when the brakeman's hand left the lever to take up the basket. Can it be said that her evidence under the circumstances is sufficient to be submitted to the jury to establish these facts?

In the case of Pleasants *vs.* Fant, 22 Wal. 116, there was evidence tending to show admissions of the defendant that he was to share in the profits of the firm of Keene & Co.

for a debt of which he was sued, but it was slight and insufficient to establish the fact in the mind of a reasonable man. Responding to the argument that, because there was some evidence, however slight, the cause should have been submitted to the jury, the court said:

> "But, as was said by this court in the case of Improvement Company *vs.* Munson, recent decisions of high authority have established a more reasonable rule that, in every case, before the evidence is submitted to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.
>
> . . . . . .
>
> "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper on these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.
>
> "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor."

In the case of the B. & O. R. R. Co. *vs.* The State, use, etc., 71 Md., a boy was run over and killed by an engine. There was some slight evidence tending to show that there might have been negligence on the part of the engineer.

The court, in reversing the judgment of the court below, and holding that the case should not have been submitted to the jury, uses the following language:

"In matters of proof we are not justified in inferring from mere possibilities the existence of facts. There must be proof of the essential facts to fix liabilities of the party charged with the commission of a wrongful act, and even a *scintilla* of evidence or a mere surmise that there may have been negligence on the part of the defendant will not justify the court in submitting the case to the jury. There must be in a case like the present some reasonable evidence of well-defined acts of negligence as the cause of the injury complained of; and, therefore, it is incumbent upon the plaintiff to give some affirmative evidence of the existence of such negligence before he can ask that the case be submitted to the jury.

. . . . . .

"Juries can not be allowed, however great the deference conceded to their province, to make mere conjecture or speculation the foundation of their verdicts. If there be no evidence upon which a rational conclusion may be based in support of the claim of the plaintiff, the case should be withdrawn from the jury; and to do this is a preliminary duty of the court.

"It has, however, been argued in support of the case of the plaintiff, that it was competent to the jury to accept and act upon such parts of the testimony of the witnesses for the defendant as they deemed proper, and to reject such other parts as they deemed unworthy of credit; and by so doing they might well have found that there was negligence on the part of the defendant. But there was really no conflict of evidence in the case, and nothing to disparage or discredit the testimony of any witness examined. But conceding the right of the jury thus to deal with the testimony of an unimpeached witness, before they could find a fact opposed to or in conflict with the testimony so rejected by them they should have legal and competent evidence before them upon which to base their finding. The jury may refuse to give credit to the statement of a witness, but they are not at liberty to infer from the rejected testimony alone, and because they do discredit it, a fact the very reverse of what has been sworn to by the wit-

> ness. Therefore, supposing the jury to have disbelieved the testimony of the witnesses for the defendant, or all such portions of it as tended to prove the non-existence of negligence on the part of the defendant, yet there is no portion of their testimony that tends to establish the existence of negligence, and consequently the case stands as it would have stood upon the testimony given on the part of the plaintiff alone; and that, as we have seen, wholly failed to make a case for the plaintiff."

In a later case above cited in 83d Md., where it is said in the opinion of the court that there was slight evidence tending to show negligence, the court used the following language:

> "But, as has been frequently held by this court, where there is no proof of negligence on the part of the defendant, or where the proof is so slight and inconclusive in its nature as to be calculated to lead the jury into wild speculation or an irrational conjecture—as it is in this case—then the duty of the court is to grant an instruction as to its legal insufficiency."

Where there is some evidence on behalf of the plaintiff which might sustain a verdict if it was uncontradicted, yet where the rebuttal is overwhelming, so that it may be said that taking all the evidence together the verdict would be unsupported by the evidence, it is the duty of the court to direct a verdict.

> Met. Railway Co. *vs.* Moore, 121 U. S. 569.
>
> Powers *vs.* N. Y. Central, etc., R. R. Co., 60 Hun, 19, affirmed in 128 N. Y. 659, and authorities therein cited.

In the case in 121 U. S., the court states that the evidence may be insufficient to sustain a verdict either because it is insufficient in law or because it may be insufficient in fact. Upon this subject the court said:

"Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged agreement was proven to be verbal, when the law required it to be in writing. In such cases, a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by counterveiling proof so potent as to leave no reasonable doubt of the opposing conclusion.

. . . . . .

"So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. The obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence," citing Randall *vs.* B. & O. R. R. Co.

In the case of Powers *vs.* N. Y. C., etc., R. R. Co., *supra*, an employee was killed because of an alleged defective engine. There was some evidence of a defect, but controlling evidence rebutting it. The court said:

"We think the evidence failed to establish the omission of any duty by the defendant, which it

> owed to the plaintiff's intestate, which caused the injury complained of. We do not think the evidence was such as would have justified the jury in finding that the defendant had omitted to exercise reasonable care and prudence in furnishing appliances for the intestate's use or in keeping them in proper repair. That there was a mere theory from which a jury might have surmised that the defendant had omitted some duty it should have performed was not enough. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to the evidence, then it is the duty of the court to direct a verdict. It was said in Baulec *vs.* New York and Harlem R. R. Co., 59 N. Y. 356, 366, by Judge Allen, that 'it is not enough to authorize the submission of a question as one of fact to the jury that there is some evidence. A *scintilla* of evidence or a mere surmise that there may have been negligence on the part of the defendants would not justify the judge in leaving the case to the jury,' quoting from Williams, J., in Toomey *vs.* Railway Company, 3 C. B. (N. S.) 146. In Hyatt *vs.* Johnston, 91 Penn. St. 200, Justice Sterrett says: 'Since the *scintilla* doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence or a mere *scintilla*, but whether there is any that ought reasonably to justify the jury in finding that the fact sought to be proved is established.'"

In Patton *vs.* Texas & Pac. R. R. Co., 179 U. S. 658, where there was some evidence, though slight, tending to show that the plaintiff, an employee, was injured by a defective engine, this court reiterates the doctrine in the following language:

> "That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such inconclusive

character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it,' "

citing many of the court's former decisions upon this point.

Second.

The court below erred in holding that the doctrine of res ipsa loquitur applies to this case or can in any way affect the question of whether the case should be taken from the jury.

The theory upon which the court below seems to have proceeded was that the mere injury to the plaintiff, regardless of the manner in which it happened, raised a presumption of negligence against the defendant, and that thereupon the burden was shifted upon the defendant to show that the injury was not occasioned by its negligence, and as that raised a question of fact it was proper to submit the case to the jury. Upon that point the court below said in its opinion:

> "The plaintiff was a passenger on the defendant's car, and, as such, was entitled to the highest degree of care and caution on the part of the carrier for her protection against injury. It is true, to make out a prima facie case, the burden of proof of negligence on the part of the defendant, as the cause of the injury, was upon the plaintiff, but this burden is changed, in the case of a passenger, by showing that the accident occurred that caused the injury to the plaintiff, while the latter was a passenger. The burden of proof is then cast upon the defendant to explain the cause of the accident, and to show, if that be the defense, that the plaintiff was negligent and that her negligence caused, or contributed to the production of, the injury (Inland and Seaboard Coasting Co. *vs.* Tolson, 139 U. S. 557). The happening of an accident to a passenger while on or getting off a vehicle, under the control of the carrier, and which, in the usual and ordinary course of things, would not happen with proper care, casts the burden

> upon the defendant of explaining the circumstances of the accident so as to relieve itself from liability" (Rec. p. 31).

It is respectfully submitted that this is not an accurate statement of the rule. The presumption of negligence never arises from the mere happening of an accident or injury to a person, whether that person be a passenger or not. The presumption of negligence arises only when the agency causing the accident is under control of the defendant and the circumstances are such that it appears to a reasonable mind that such an accident does not ordinarily happen, except where it is preceded by negligence. Nor does the rule ever apply to a case where the defendant controverts the fact which raises the presumption. The presumption arises only upon the admission of the fact or the proof of it.

The cases in this court fully illustrate that doctrine.

In the case of Stokes *vs.* Saltonstall, 13 Pet. 181, it was held that the upsetting of the defendant's stage coach, whereby the plaintiff's wife was injured, raised the presumption of negligence against the defendant, but that presumption did not arise from the mere injury to the plaintiff's wife, but from the fact of the extraordinary occurrence of the upsetting of the stage coach, and that fact was not controverted by the defendant.

In the case of Transportation Company *vs.* Downer, 11 Wall. 129, this court states the rule in the following language:

> "A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

In the case of Railroad Company *vs.* Pollard, 22 Wall. 341, the injury to Mrs. Pollard occurred by the car in which she was riding being bumped violently against another car, which threw her against a seat in the car in which she was standing at the time, and severely injured her. The court instructed the jury substantially that if they believed that there was an unusual violent bumping of the cars, which threw Mrs. Pollard against the seat, that would be prima facie evidence of negligence unless rebutted by proof on behalf of the defendant.

In the case of Inland and Seaboard Coasting Company *vs.* Tolson, 139 U. S. 557, the trial court instructed the jury substantially that if they should find from the evidence that the steamboat, which caused the injury, was thrown against the wharf with such force as to tear up some of the planks, that would be prima facie evidence of negligence on the part of those in control of the steamboat and that instruction was approved by this court. It is clear, however, from the language of the instruction, and of this court in approving it, that that presumption arose from the unusual occurrence of the steamboat striking the wharf with such force as to break it and not the injury to Tolson.

In the case of Gleeson *vs.* Virginia Midland R. R. Co., 140 U. S. 435, the accident happened because of a landslide in a railroad cut caused by an extraordinary fall of rain. It was admitted that the accident happened because of the obstruction of the track by this landslide. The defense was that the landslide was "an act of God," which the court overruled and held that the fact of the obstruction of the track was prima facie evidence of negligence.

In the case at bar the defense does not admit that the car started and thereby threw the plaintiff to the ground. If it made such admission and attempted to show that the starting was not through its negligence then the rule would apply. But the defense is that the car did not start or jerk, but that the plaintiff alighted from the car while it was in

motion and was thereby injured; and that taking all the evidence together, that of the plaintiff as well as that of the defendant, there is not sufficient to support a finding by the jury that the car did start or jerk. Had the case been one that was proper to submit to the jury an instruction to them that if they found from the evidence that the car did start or jerk while the plaintiff was alighting and that she was thereby injured, it would raise a presumption of negligence against the defendant, would have been proper. But that is not the application of the rule that was made by the court below. On the contrary, it held and gave as a reason why the case was properly submitted to the jury, that the plaintiff being a passenger the mere injury to her raised a presumption against the defendant that the accident and injury was caused by its negligence. And it is this application of the rule of which we complain and respectfully say that so far as counsel for the plaintiff in error have been able to find, there is no case that justifies it.

The court below in two prior cases held and applied the rule as we now contend.

In the case of Weaver *vs.* B. & O. R. R. Co., 3 App. Cas. D. C. 436, a mail clerk was killed on a moving train by striking his head against a bridge post near the station where the bag was caught, the post being but 9 inches from the passing car, and the court below said:

> "Whilst the plaintiff's intestate is to be considered as a passenger, it can not be presumed, from the mere fact of his having been killed while *en route*, that the injury was caused by the negligence of the defendant. That he was found dead in the car, killed by coming in contact with the bridge post, does not of itself shift the burden of proof to the defendant. The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action it must be proved by the party alleging it. There are some cases in which it has been said that the law presumes negligence on the part of the carrier from the mere happening of an accident to a

> passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that when an injury occurs through some accident to the means of transportation, which is under the management of the carrier's employees and which, if they exercise proper care, can not ordinarily happen, it affords reasonable evidence, in the absence of explanation, from which negligence may be inferred."

In the subsequent case of Harbison *vs.* R. R. Co., 9 App. D. C. 67, where a passenger who was passing from one end of the car to the other on the running board on the side next the reverse track, and was struck by a car passing in the opposite direction, the court below said:

> "The appellant contends that, to the facts as stated, the maxim *res ipsa loquitur* applies; that, being a passenger upon the car, a presumption of negligence arises from the happening of the accident, which the defendant is called on to rebut,"

and the appellant's contention was negatived by a quotation by the court of what it had said in the preceding case. The two last-named decisions seem to be in harmony with the rule. If the facts in those cases had been proper for the application of the rule, both should have been submitted to the jury, a proposition which that court denied. The court was correct in refusing to apply the rule in those two cases, and it therefore follows that it erred in applying it to the case under consideration.

The following cases in some of the State courts illustrate the application of the rule and demonstrate that the ruling of the court below was error.

In the case of Whalen *vs.* Consolidated Traction Co., 61 N. J. Law 609, the rule is stated thus:

> "The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which

might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised.

"Thus, in Christie *vs.* Griggs, 2 Campb. 79, the plaintiff, a passenger in a stage coach, proved that the axletree broke, and Chief Justice Mansfield, deeming such proof prima facie evidence of negligence, called upon the defendant to show that the damage arose from mere accident.

"In Carpue *vs.* London Railway Co., 5 Q. B. 747, where the train had left the track, Chief Justice Denman instructed the jury that the exclusive management of the machinery and railway being in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced, which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give."

In Feital v. Middlesex R. R. Co., 109 Mass. 405, where the evidence of the plaintiff showed injury by the car running off the track, and the question was whether the jury might find negligence from those facts, the court said:

"The burden is on the plaintiff to prove the defendant's negligence. But there are cases where proof of the occurrence of the accident, and of the exercise of due care on the part of the plaintiff, is prima facie proof of the defendant's negligence. A railroad and its cars are constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off is evidence of defect or negligence somewhere; and where the track and the cars are under the exclusive control of the defendants, it has been held evidence of negligence sufficient to charge them, in the absence of any explanation showing that the accident happened without fault on their part. Le Barron *vs.* East Boston Ferry Co., 11 Allen, 312; Carpue *vs.* London & Brighton Railway Co., 5 Q. B. 747. It is not incumbent on the plaintiff, after proving an accident which implies

negligence, to go further and show what the particular negligence was, when from the circumstances it is not in his power to do so."

In the case of the Chicago City Ry. Co. *vs.* Rood, 163 Ills. 477, where a passenger was injured by a wagon passing the car on which he was riding, and the trial court instructed the jury that they might presume negligence therefrom, and that the burden was on the defendant to rebut such presumption, the Supreme Court of that State, reversing a judgment in favor of plaintiff, examined the doctrine critically, and in course of the opinion said:

> "The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier . . . Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper, or unskillful, or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. . . . The presumption in question comes from the nature of the accident and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage-coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a

> collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway."

The authorities concur in holding that this rule is not applicable alone to cases where the relation of passenger and carrier exists between the plaintiff and the defendant, but applies in all cases where an injury occurs as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, or where the accident or occurrence would not have happened if the person having control of the agency causing it had acted with due care.

N. C. Street Ry. Co. *vs.* Cotton, 140 Ills. 494–5.

In Thomas *vs.* Philadelphia and Reading Railroad Company, 148 Pa. St. 183, where the accident occurred to a passenger seated at an open window who was struck by a missile causing the injury, and where there was no evidence as to how the missile came to be thrown, Mr. Chief Justice Paxson said:

> "The rule appears to be that where a passenger is injured, either by anything done or omitted by the carrier or its employees, or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence. But to throw this burden upon the carrier it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation,"

and it was held that no presumption of negligence arose from the happening of the accident in that case.

In the later case of Fleming *vs.* P. C. C. & St. L. R. R. Co., 158 Pa. St. 130, where a stone fell from a point without the right of way of the defendant, striking and killing a passenger, the same rule was announced and followed.

In the case of Benedick *vs.* Potts, 88 Md. 52, the facts were that the plaintiff was riding in an open car on defendant's circular inclined switch-back railway, at a pleasure resort, and fell from the car while it was passing through a tunnel. The car was not derailed and other persons in it were not injured, and there was no defect in the construction of the tunnel or of the car. No evidence was offered to show how or why plaintiff fell on the track, where he was afterwards found unconscious. In holding that no presumption of negligence arose from such facts, it was said by the court:

> "It is a perfectly well-settled principle that to entitle a plaintiff to recover in an action of this kind he must show not only that he has sustained an injury, but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the nexus between them must exist to constitute a cause of action. As an injury may occur from causes other than the negligence of the party sued, it is obvious that before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evidence legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. *In no instance can the bare fact that an injury has happened of itself and divorced from all the surrounding circumstances justify the inference that the injury was caused by negligence.* (Italics are ours.) It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and in the very nature of things it never can be dis-

regarded. There are instances in which the circumstances surrounding an occurrence and giving a character to it are held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are instances where the doctrine of res ipsa loquitur is applied. This phrase, which literally translated means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz, 'first, when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property and is so tortious in its quality as in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency.' Thompson on Neg. 574. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the cause of that injury—it is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish the ground for presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly can not be predicated of any act until you know what the act is. Until you know

> what did occasion an injury, you can not say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact what it was that did the injury, and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim res ipsa loquitur has no application; it is confined, when applicable at all, solely to the second. *In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies, because when the thing which produced the injury is unknown it can not be said to speak or to indicate the existence of causative negligence.*" (Italics are ours). "In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence—something more was required to be shown."

In Paynter *vs.* B. & M. Traction Co., 67 N. J. 619, the evidence showed that the plaintiff was injured by falling to the ground while in the act of alighting from the defendant's car. The testimony of the plaintiff and two other witnesses had some slight tendency to prove that the fall was caused by the starting or jerking of the car while she was getting off. The trial court overruled a motion to nonsuit the plaintiff on the evidence offered in her behalf, and there was a verdict and judgment in her favor. Upon an appeal by the defendant it was argued in favor of the plaintiff that the judgment should be sustained on the rule of *res ipsa loquitur*, even though the evidence in behalf of plaintiff might be insufficient to establish the fact that the car started while she was in the act of alighting. But the court refused to apply the rule to that state of facts, saying:

> "A fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of res ipsa loquitur. The thing that happened in no way can be said to prove that the defendant was negligent. The only thing proved was the fall. Nothing was proved causing the

fall, or any circumstances which could be in any way said to show that the defendant was negligent. If it had been proved that a jerk or jolt of the car had produced the fall, that fact, unexplained, might be said to prove the defendant's negligence, although the defendant might furnish an explanation of it which would relieve from responsibility. These principles are very fully discussed in the case of Benedick *vs.* Potts, supra, by Chief Justice McSherry, of the Maryland Court of Appeals.

"The application for a non-suit at the close of the plaintiff's case should have been granted."

The court erred in refusing to give the two instructions as prayed by the defendant.

The object and scope of those instructions were to confine the jury in their consideration of the case to the question of whether the accident was occasioned by the negligence of the motorman. The plaintiff herself expressly testified that there was no fault on the part of the conductor, and if the case was to be submitted to the jury at all the defendant was entitled to have the attention of the jury directed to the particular act of negligence specified by the plaintiff, that counsel might argue to the jury that upon the whole evidence they would not be justified in finding that the motorman stopped the car without turning off the current and without fixing the dog in the brake, which is the only theory upon which negligence could be found in the case. But the court refused these instructions and left the case open for the jury to speculate upon the question of whether either the conductor or motorman might not have been guilty of some act of negligence of which there was no evidence whatever. The authorities hereinbefore referred to show conclusively that if it was proper to submit the case to the jury at all, the court erred in not giving instructions asked for.

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